

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

FOREMOST INSURANCE COMPANY  
GRAND RAPIDS MICHIGAN,

Plaintiff,  
v.

ERIK GUILLEN, et al.,

## Defendants.

Case No. 3:22-cv-5477-TLF

## ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT

V.

This matter comes before the Court on plaintiff's motion for summary judgment regarding the number of accidents, and defendants' motion for summary judgment regarding waiver, estoppel, and number of accidents. Dkts. 10, 32. The Court has considered the evidence submitted by both parties, and the briefs and argument submitted for each motion; the Court denies both motions for summary judgment regarding the number of accidents, because genuine questions of fact remain regarding the number of accidents in this case. With respect to the defendant's motion for summary judgment on the issues of waiver, and estoppel, the Court denies both motions for summary judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

The following facts are undisputed.

1 On September 16, 2021, defendants were involved in a motor vehicle accident in  
2 Vancouver, Washington that was caused by an uninsured intoxicated driver. Dkt. 10-2  
3 Police Report (Sealed); Dkt. 22, Declaration of Diana Andrade, at ¶ 3-4. The police  
4 report indicates that the posted speed limit at the location of the incident was 35 mph.  
5 Dkt. 10-2 (Sealed) at 6. The intoxicated drivers' event data recorder (EDR) indicated  
6 that between 2 and 5 seconds before the initial crash the vehicle was traveling between  
7 67 mph and 70 mph. *Id.*; Dkt. 36-7, CDR Report. Two seconds before the first impact,  
8 the vehicle's brakes engaged, slowing the vehicle on impact to 59 mph. *Id.*

9 The report indicates that after the first crash, there was at least one other  
10 collision between the same two vehicles at 36 mph. Dkt. 10-2 at 7; Dkt. 36-7. The other  
11 impact occurred 4 seconds after the initial impact. *Id.*

12 After the collisions, the driver drove into oncoming traffic before continuing in the  
13 southbound lane. Dkt. 10-2 at 1. The police report concluded the events were the result  
14 of the uninsured driver's "driving under the influence, his excessive speed, and his  
15 inability to respond or react to a vehicle traveling in front of him due to his level of  
16 intoxication." *Id.* at 7.

17 Defendants are insured under Policy Number G01 0294646 03. Dkts. 10-4, 36-1,  
18 Certified Policy. The personal injury protection (PIP) coverage was \$10,000 per person  
19 for medical costs, and uninsured motorist bodily injury (UMBI) coverage was \$100,000  
20 per person and \$300,000 per occurrence, for bodily injury damages. *Id.* Under the  
21 policy, plaintiff agreed to cover the defendants for PIP and UMBI on a "per accident"  
22 basis. *Id.* at 5, 10-11, 18-20, 24, 29-31, 48. With respect to the PIP provision of the  
23 policy, an accident is "a sudden, unexpected and unintended event that arises out of the  
24

1 ownership, maintenance, or use of an auto as an auto, and that causes bodily injury or  
2 property damage during the policy period.” *Id.* at 10. The UMBI portion of the policy  
3 states that an accident is “an occurrence that is unexpected and unintended from the  
4 standpoint of the insured person.” *Id.* at 10, 25.

5 Defendants made a claim to plaintiff for personal injury protection and uninsured  
6 motorist benefits. Dkt. 10-5, Letter to defendants (9/20/2021); Dkt. 25-3, Letters to  
7 defendants (1/26/2022; 2/24/2022); Dkt. 25-4, Letter to defendants (10/12/2021;  
8 11/23/2021). On October 5, 2021, defendants’ counsel emailed the police report to  
9 Foremost, and requested review “for a second, or possibly third, layer of UM/UIM  
10 coverage and PIP coverage and advise”. Dkt. 10-6 at 2-3; Dkt. 36-4, at 1. On October  
11 25, 2021, defendants sent by post a request that Foremost provide a written denial of  
12 coverage, with a detailed explanation and supporting information. Dkt. 10-6 at 4-5. On  
13 October 27, 2021, defendants emailed Foremost, requesting written confirmation of  
14 coverage. Dkt. 10-7, and Dkt. 36-4 at 3, email to plaintiff (10/27/2021). Defendants  
15 responded and explained that their position was two separate and distinct incidents  
16 occurred, and that the two collisions were not a continuous event. Dkt. 10-7, at 2-3.

17 Plaintiff “opened and paid a PIP exposure” for defendants Eric Guillen and Diana  
18 Andrade. Dkt. 25-3, at 1-2 (Letter from James Rash, Foremost Med/PIP Claims  
19 Representative, regarding claims for Eric Guillen (1-26-2022), and (2-24-2022)); Dkt.  
20 25-4 at 1-2 (Letter from James Rash, Foremost Med/PIP Claims Representative,  
21 regarding claims for Diana Andrade (10-12-2021) and (11-23-2021)).

22 Plaintiff did not open or pay a UMBI exposure for two accidents; plaintiff  
23 confirmed in a letter to defendants “that there was only one accident and not two  
24

1 accidents for the purposes of . . . UIM coverage." Dkt. 36-6, letter of Rory W. Leid, III to  
2 Benjamin P. Melnick (July 1, 2022), at 1.

3 The parties' assertions regarding whether there are genuine disputes of material  
4 fact, will be discussed as relevant to the legal analysis, below.

5 DISCUSSION

6 Summary judgment is supported if the movant "shows that there is no genuine  
7 issue as to any material fact and that the movant is entitled to judgment as a matter of  
8 law." Federal Rule of Civil Procedure (FRCP) 56 (a). When more than one party files a  
9 motion for summary judgment concerning the same claim, the district court is required  
10 to independently review the evidence submitted on both motions, and decide whether  
11 there are genuine disputes of material fact; the Court is not bound by the parties  
12 contentions about whether there are, or are not, any material factual issues. *Fair*  
13 *Housing Council of Riverside County., Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th  
14 Cir. 2001). When considering summary judgment motions filed by different parties, the  
15 court must "giv[e] the nonmoving party in each instance the benefit of all reasonable  
16 inferences." *Am. Civil Liberties Union of Nev. v. City of Las Vegas*, 466 F.3d 784, 791  
17 (9th Cir. 2006). The purpose of summary judgment is "to isolate and dispose of factually  
18 unsupported claims or defenses. . ." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324  
19 (1986).

20 The moving party bears the initial burden to demonstrate the absence of a  
21 genuine dispute of material fact for trial. *Celotex*, at 323. A genuine dispute concerning  
22 a material fact is presented when there is sufficient evidence for a reasonable jury to  
23  
24

1 return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,  
 2 252 (1986); *Acosta v. City National Corporation*, 922 F.3d 880, 886-887 (9th Cir. 2019).

3 In this context, materiality means the fact is “relevant to an element of a claim or  
 4 defense and whose existence might affect the outcome of the suit”; thus, materiality is  
 5 “determined by the substantive law governing the claim.” *T.W. Elec. Serv., Inc. v. Pacific*  
 6 *Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987); see also, *Acosta*, 922 F.3d  
 7 at 887 (the court asks “whether reasonable jurors could find by a preponderance of the  
 8 evidence that [the moving party] is entitled to a verdict – whether there is evidence upon  
 9 which a jury can properly proceed to find a verdict for the party producing [the  
 10 evidence], upon whom the onus of proof is imposed.” (quoting, *Anderson v. Liberty*  
 11 *Lobby*, 477 U.S. at 252)).

12 The non-moving party is required to show that genuine issues of material fact  
 13 “can be resolved only by a finder of fact *because they may reasonably be resolved in*  
 14 *favor of either party.*” *California Architectural Building Prods., Inc. v. Franciscan*  
 15 *Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987) (quoting *Anderson*, 477 U.S. at  
 16 250) (emphasis in original)). The non-moving party must make a showing that is  
 17 sufficient to establish the existence of any element for which the moving party has  
 18 successfully met its initial burden of showing an absence of a genuine dispute of  
 19 material fact. *Celotex*, 477 U.S. 317, 322-323. When the Court considers a motion for  
 20 summary judgment, “[t]he evidence of the non-movant is to be believed, and all  
 21 justifiable inferences are to be drawn in [their] favor.” *Anderson*, at 255. Yet the Court is  
 22 not allowed to perform the jury’s function – the Court may not weigh evidence, draw  
 23 legitimate inferences from facts, or decide credibility. *Id.*

1       The Court may not disregard evidence solely based on its self-serving nature.  
2 *Nigro v. Sears, Roebuck & Co.*, 784 F.3d 495, 497 (9th Cir. 2015). “The district court  
3 can disregard a self-serving declaration that states only conclusions and not facts that  
4 would be admissible evidence.” *Id.*

5                  A. Motion to Strike

6       Plaintiff’s reply brief (for its summary judgment motion) and response brief (for  
7 defendants’ summary judgment motion) requests that the Court strike defendants’  
8 declarations as redundant and inconsequential under Federal Rule of Civil Procedure  
9 12(f). Dkt. 43, 45. For the reasons set forth herein, the Court denies plaintiff’s motion to  
10 strike.

11       The function of Fed. R. Civ. P. 12(f) is to avoid wasting time and money litigating  
12 spurious issues -- by dismissing those issues prior to trial. *Whittlestone, Inc. v. Handi-*  
13 *Craft Co.*, 618 F.3d 970, 973-74 (9th Cir. 2010). The language of Rule 12(f) limits its  
14 applications to defenses in a pleading. Fed. R. Civ. P. 12(f). A pleading is defined as:  
15 “(1) a complaint; (2) an answer to a complaint; (3) an answer to a counterclaim  
16 designated as a counterclaim; (4) an answer to a crossclaim; (5) a third-party complaint;  
17 (6) an answer to a third-party complaint; and (7) if the court orders one, a reply to an  
18 answer.” Fed. R. Civ. P. 7. If the motion is directed to one of these pleadings, then the  
19 Court analyzes whether the issue sought to be stricken is: “(1) an insufficient defense;  
20 (2) redundant; (3) immaterial; (4) impertinent; or (5) scandalous.” *Whittlestone, Inc.*, 618  
21 F.3d at 973-74.

22       In this case, plaintiff moves to strike declarations in support of defendants’ own  
23 motion for summary judgment, and the same declarations submitted in support of  
24

1 defendants' opposition to Foremost's motion for summary judgment. Yet these  
2 declarations are not pleadings, and Fed. R. Civ. P. 12(f) is therefore inapplicable.

3 Even if the Court considered plaintiff's motion to strike as a motion relating to  
4 inadmissibility of evidence, the motion would be denied. Plaintiff argues these  
5 declarations should be stricken because they conflict with the police reports and other  
6 evidence in the record. Dkt. 43 at 2. This argument goes to the weight and credibility of  
7 the witness testimony. The Court cannot weigh evidence, draw inferences from facts, or  
8 decide credibility on a motion for summary judgment. *Anderson*, 477 U.S. at 255.

9 Further, plaintiff argues that Mr. Hubbard's declaration should be stricken  
10 (presumably as being more prejudicial than probative under Fed. R. Ev. 403) because  
11 he has no experience in accident reconstruction, or experience with impaired drivers or  
12 traffic investigations. Dkt. 43 at 3. Although evidence presented with respect to  
13 summary judgment motions need not be in the exact form that would be admissible at  
14 trial, the proponent of the evidence is required to "set out facts that it will be able to  
15 prove through admissible evidence." *Norse v. City of Santa Cruz*, 629 F.3d 966, 973  
16 (9th Cir. 2010).

17 In this case, Mr. Hubbard's declaration is not being offered by the defendants as  
18 expert testimony under Fed. R. Ev. 702-705. The defendant's declaration from Mr.  
19 Hubbard provides testimony regarding the movement of a vehicle driven by an  
20 intoxicated driver that Mr. Hubbard states he observed. Dkt. 24. A percipient witness  
21 need not be an expert to testify regarding conduct observed; his background and  
22 experience may be considered by the jury as a credibility factor, but it is not a reason to  
23 exclude the evidence for purposes of summary judgment. This ruling is only for  
24

1 purposes of summary judgment and does not prevent plaintiff from objecting to  
2 evidence in a motion in limine before trial or from making an objection during trial. See  
3 *Norse*, at 974-975 (district court was required to “rule on evidentiary objections material  
4 to its summary judgment ruling”).

5 Plaintiff’s motion to strike defendants’ evidence is denied.

6       B. Estoppel

7       The defendant argues plaintiff is estopped from asserting there was only one  
8 accident under the UMBI policy, when plaintiff already provided coverage under the PIP  
9 policy. Under RCW 48.22.030, there is a strong public policy to ensure coverage for  
10 innocent victims of drivers who are uninsured; UIM coverage is a “floating layer” above  
11 the available limits of any insurance policy held by the tortfeasor. *Fisher v. Allstate Ins.*  
12 Co., 136 Wn.2d 240, 244 (1998); *Cherry v. Truck Insurance Exchange*, 77 Wn. App.  
13 557, 561 (1995).

14       The defense of estoppel requires the defendants to show: (1) “an admission,  
15 statement, or act inconsistent with the claim” that plaintiffs asserted at a later time; (2)  
16 the defendant reasonably relied on plaintiff’s admission, statement or act and defendant  
17 took action “on the faith of such admission, statement, or act,” and (3) defendants were  
18 injured as a result of allowing plaintiff to “contradict or repudiate such admission,  
19 statement, or act.” *Saunders v. Lloyd’s of London*, 113 Wn.2d 330, 340 (1989). The  
20 courts disfavor estoppel, and the [party asserting estoppel] is required to prove it by  
21 “clear, cogent, and convincing evidence.” *Shelcon Constr. Grp., LLC v. Haymond*, 187  
22 Wn. App. 878, 902 (2015). “Equitable estoppel is a question for the trier of fact, unless  
23 only one reasonable inference can be drawn from the evidence.” *Id.*

1       The “injury” element requires the defendant “to show a detrimental change of  
 2 position based upon the [other party’s] representation.” *Silverstreak, Inc. v. Washington*  
 3 *State Dept. of Labor and Indus.*, 159 Wn.2d 868, 889 (2007). And, injury may also be  
 4 found if a party’s act or omission becomes the basis for a legal dispute in the matter  
 5 before the court. *East Lake Water Ass’n v. Rogers*, 52 Wn. App. 425, 430 (1988).

6       Estoppel or waiver should not be applied if it would result in “coverage or  
 7 restrictions on the coverage be[ing] extended by the doctrine of waiver or estoppel.”  
 8 *Show v. Pemberson*, 73 Wn. App. 107, 111 (1994) (quoting *Carew, Shaw &*  
 9 *Bernasconi, Inc. v. General Cas. Co. of Am.*, 189 Wash. 329, 336 (1937)). There are  
 10 limited circumstances where this rule would not apply (e.g. insured justifiably relies on  
 11 statements or conduct of insurer and but for estoppel, the entire policy would have been  
 12 forfeited). *Show v. Pemberson*, 73 Wn. App. at 112.

13       For example, if an insurer breaches an important benefit of the insurance  
 14 contract, the court may consider bad faith estoppel and if all the elements are  
 15 established by the insured, the insurer will be estopped from denying coverage. *Safeco*  
 16 *Ins. Co. of America v. Butler*, 118 Wn.2d 383, 394-395 (1992). To prevail on a claim of  
 17 bad faith estoppel, the insured must prove: (1) the insurer acted in bad faith; (2) if the  
 18 insured proves bad faith by a preponderance of the evidence, then there is a  
 19 presumption of harm; (3) if the insurer shows by a preponderance of evidence its acts  
 20 did not harm or prejudice the insured, then the presumption is rebutted; and (4) “if the  
 21 insured prevails on the bad faith claim, the insurer is estopped from denying coverage.”  
 22 *Id.* at 394. Whether an insurer acted in bad faith is a question of fact – and whether the  
 23 acts of the insurer prejudiced the insured is also a question of fact. *Id.* at 395-396.

1       All of these issues concerning estoppel involve genuine disputes of material  
2 facts, and therefore are inappropriate for summary judgment. Concerning traditional  
3 estoppel, the defendants would be required to establish that Foremost made an  
4 admission, statement or act that was inconsistent with a position taken later. But the  
5 plaintiff points out, the law concerning UIM allows the insurer to step into the shoes of  
6 the un- or under-insured motorist and assert defenses the alleged tortfeasor would have  
7 been able to assert. The insured must prove, concerning bad faith estoppel, that the  
8 insurer acted in bad faith; whether harm or prejudice is presented on these facts would  
9 also be a jury question; and the defendant would need to establish the elements of  
10 estoppel by clear, cogent, and convincing evidence. This is a heavy burden of proof,  
11 and there are genuine disputes of material fact that should be decided by the jury;  
12 therefore the Court will not grant summary judgment.

13           C. Waiver

14       According to defendants, plaintiff waived their right to contest coverage because  
15 they paid the PIP claim and did so on the basis that two accidents happened.  
16 Defendants assert that “there is no other reasonable interpretation of Foremost’s  
17 actions except that it intended to waive the right to contest the number of accidents for  
18 coverage purposes.” Dkt. 32, Defendants’ Motion for Summary Judgment, at 7.

19       Under Washington law, an insurer will be found to have waived a right under the  
20 contract if it has “voluntarily and intentionally relinquished a known right or . . .their  
21 conduct ‘warrants an inference of the relinquishment of such right.’” *Saunders v. Lloyd’s*  
22 *of London*, 113 Wn.2d 330, 339-340 (1989) (quoting *PUD 1 v. WPPSS*, 104 Wn.2d 353,  
23 365 (1985). To prevail, the party asserting waiver must show the insurer made a

24

25

1 knowing and conscious decision to relinquish the right, and a person must know certain  
2 conduct would have the effect of relinquishing the right; “conduct giving rise to a waiver  
3 argument cannot be consistent with any other interpretation than intent to waive”. *Id.* at  
4 340 (quoting *PUD 1 v. WPPSS*, at 365). A waiver by conduct must be an unequivocal  
5 act that evidences an intent to waive. *American Safety Cas. Ins. Co. v. City of Olympia*,  
6 162 Wn.2d 762, 771 (2007).

7       Although the PIP payment was based on a two-accident assessment, this fact,  
8 standing alone, does not prove an unequivocal intent to waive for purposes of the UMBI  
9 portion of the policy. The plaintiff would need to show the insurer made a knowing and  
10 conscious decision to relinquish the right to challenge whether there was one accident,  
11 or two accidents under the UMBI portion of the policy. As the defendant observes, the  
12 law concerning UIM allows the insurer to step into the shoes of the un- or under-insured  
13 motorist and assert defenses the alleged tortfeasor would have been able to assert. It is  
14 possible that plaintiff would present facts to a jury that the conduct was unequivocal, but  
15 this is a genuine question or material fact and therefore the Court cannot decide this  
16 issue on summary judgment.

17           D. Number of Accidents

18       Plaintiff’s motion for summary judgment requests that the Court find as a matter  
19 of law, there was only one accident for purposes of insurance coverage. Dkt. 10.  
20 Defendants oppose plaintiff’s motion for summary judgment, arguing that a reasonable  
21 jury could find more than one accident for purposes of insurance coverage. Dkt. 21.

22       Defendants’ motion for summary judgment requests that the Court find as a  
23 matter of law, there was two accidents for purposes of insurance coverage. Dkt. 32.

24

25

1 Plaintiff has opposed defendants' motion arguing that only one accident occurred for  
2 purposes of insurance coverage. Dkt. 45.

3 Because genuine disputes of material fact exist regarding the number of  
4 accidents, both motions for summary judgment are denied.

5 Under Washington law, all injuries or damage occurring from "a single  
6 'proximate, uninterrupted, and continuing cause' must be treated as arising from a  
7 single accident." *Pemco Mut. Ins. Co. v. Utterback*, 91 Wn. App. 764, 768 (1998)  
8 (quoting *Truck Ins. Exch. v. Rhode*, 49 Wn.2d 465, 471 (1956)). If each collision has its  
9 own separate proximate cause, then they are considered separate accidents for  
10 purposes of insurance coverage, "even if the two accidents occurred coincident, or  
11 nearly coincident, in time." *Greengo v. Public Emples. Mut.I Ins. Co.*, 135 Wn.2d 799,  
12 813-814 (1998).

13 To determine the number of accidents for insurance coverage purposes, the  
14 Court must look to the number of causes. *Transcon. Ins. Co. v. Wash. Pub. Utils.*  
15 *Districts' Util. Sys.*, 111 Wn.2d 452, 467 (1988) ("[T]he number of triggering events  
16 depends on the number of causes underlying the alleged damage and resulting  
17 liability.") (citing with approval *Liberty Mut. Ins. Co. v. Rawls*, 404 F.2d 880, 881 (5th Cir.  
18 1968) (finding two occurrences when the driver struck two cars, but gained control  
19 between the first and second impact)); see also, *Greengo v. Public Emples. Mut.I Ins.*  
20 *Co.*, 135 Wn.2d 799, 813-814 (1998) ("Where there were two collisions, we look to see  
21 if each has its own proximate cause. If so then there are two accidents.").

22 In *Truck Ins. Exch. v. Rohde*, a driver negligently drove over the center line into  
23 oncoming traffic hitting a motorcycle, causing the car to turn counterclockwise colliding  
24

1 with two other motorcycles. 49 Wn.2d at 467. The Court held that there was only one  
2 accident because there was one proximate, uninterrupted and continuous event that  
3 caused all the injuries and damages. *Id.* at 473.

4 In *Pemco Mut. Ins. Co. v. Utterback*, a driver drove over a curb hitting a  
5 pedestrian and attempting to reverse, the vehicle lurched forward hitting the pedestrian  
6 a second time. 91 Wn. App. at 766. The court found that due to the continuity, proximity  
7 in time and location of the events and because the drive never regained control of the  
8 situation between impacts, there was only one accident. *Id.* at 772.

9 In *Greengo v. Public Emples. Mut. Ins. Co.*, the plaintiff was injured when the  
10 vehicle in which she was a passenger rear-ended another vehicle as a third vehicle  
11 rear-ended plaintiff's vehicle. 135 Wn.2d at 803. The police report of the events  
12 indicated that two drivers were separately negligent because they were following the  
13 other car too closely. *Id.* at 815. The Court overturned a summary judgment where the  
14 trial court ruled there was only one collision, because if the events occurred as  
15 described in the police report, each collision had its own separate proximate cause –  
16 each driver's negligence in following the vehicle in front of them too closely. *Id.*

17 It is undisputed in this case that there were at least two collisions between the  
18 intoxicated drivers' vehicle and the defendants' vehicle. Plaintiff argues that based on  
19 the police report, there was only one accident because the intoxicated driver did not  
20 regain control of the vehicle between the collisions. Dkt. 10 at 8. Further, plaintiff  
21 contends that the collisions occurred in quick succession, without interruption and as a  
22 result of one proximate cause – the intoxicated drivers' negligence. *Id.*

1 Defendants have provided declarations stating that they recall *three* collisions.  
2 Dkt. 22, Declaration of Diana Andrade; Dkt. 23, Declaration of Erik Guillen. Ms. Andrade  
3 asserts that she “noticed in my rearview mirror the other car coming up really fast  
4 behind us. I yelled, ‘Babe!’ to get my husband’s attention. I felt the first impact push us  
5 forward really hard. There was a small gap in time and then there was a second  
6 impact.” *Id.* at 2. She also asserts: “I started screaming about why the other driver was  
7 doing this to us and what was happening. I felt a third impact and heard the car  
8 accelerating away also within a short period of time.” *Id.* Mr. Guillen asserts that “my  
9 wife made a surprised comment. There was a loud boom and our car was violently  
10 pushed forward. I turned around and looked between the seats to see what happened  
11 and to check on our daughter. I could see the other car still coming. There was a  
12 second impact.” Dkt. 23, at 2. Mr. Guillen states that he heard Ms. Andrade screaming,  
13 and he tried to tell her to move their car out of the way; then he heard “the other car’s  
14 engine revving and it sounded like it was accelerating.” *Id.* Mr. Guillen asserts he felt a  
15 third impact “as the other car drove away”. *Id.*

16 Defendants also submitted the declaration of John Hubbard – a witness to the  
17 collision. Dkt. 24. Mr. Hubbard testified to witnessing two collisions. *Id.* Mr. Hubbard  
18 states that “[t]here was time in between the first impact and the second impact for the  
19 driver of the at-fault car to have stopped. There was time for him to make a decision”.  
20 *Id.* at 2. Mr. Hubbard asserts that it appeared to him the driver of the at-fault car was in  
21 control of the vehicle and the situation when “[t]he driver chose to accelerate hard away”  
22 and collided with defendants’ car a second time. *Id.*

23

24

25

Further, defendants note that, according to the police investigation and the intoxicated driver's crash data retrieval system, data shows that leading up to the first impact, the brake at first was not applied, and then the brake was applied; leading up to the second impact, the brake initially was on but then the break was off before the second impact happened. Dkt. 25, Declaration of Benjamin P. Melnick; Dkt. 25-1, Police Report at 4-5; Dkt. 25-2, Crash Data Retrieval File, at 6, 12.

Based on the evidence in the record, there appears to be a genuine dispute of material facts in the case. There is conflicting evidence in the record regarding whether there is more than one cause of each collision -- whether the collisions occurred as a continuous uninterrupted event caused by the driver's negligence or whether the subsequent collisions after the initial collision occurred as a result of the driver's intentional attempt to flee the first collision. As in *Greengo v. Public Emples. Mut.I Ins. Co.*, 135 Wn.2d 799, 813-814 (1998), a reasonable jury weighing all the evidence could resolve this dispute in favor of either party.

The Court denies both motions for summary judgment on the number of accidents in this case because genuine questions of material fact remain.

## CONCLUSION

For the reasons set forth herein, both motion for summary judgment are DENIED. Dkt. 10, 32.

Dated this 15th day of November, 2022.

Theresa L. Fricke  
Theresa L. Fricke  
United States Magistrate Judge